

Message

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**From:** Jolish, Taly [jolish.taly@epa.gov]  
**Sent:** 4/30/2013 4:30:48 PM  
**To:** Esler, Eric [Esler.Eric@EPA.GOV]  
**Subject:** FW:

Eric, these are all of the emails without attachments (in reverse chron, I believe). I will forward the rest in smaller batches.

---

**From:** Taly Jolish [mailto:Jolish.Taly@epamail.epa.gov]  
**Sent:** Tuesday, April 30, 2013 9:26 AM  
**To:** Jolish, Taly  
**Subject:**

Confidential -- Attorney-Client Communication/Work Product

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925  
[jolish.taly@epa.gov](mailto:jolish.taly@epa.gov)

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

**Ex. 5 AC/DP**

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----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: James Chang/R9/USEPA/US  
To: "Soloyanis, Susan" <ssoloyan@mitretek.org>,  
Cc: david.green@afropa.pentagon.af.mil, Jehiel Cass <jcass@rb6v.swrcb.ca.gov>, Taly Jolish/R9/USEPA/US@EPA, John Hamill/R9/USEPA/US@EPA  
Date: 01/22/2007 02:22 PM  
Subject: RE: D-8 FOST RTCs

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Our initial comment #7 relates to our suspicion that pesticides were applied onto and around the foundation of the hospital. If you know that it was not the case, and there are no pesticides on the parcel, the FOST needs to state so.

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

▼ "Soloyanis, Susan" <ssoloyan@mitretek.org>

"Soloyanis, Susan" <ssoloyan@mitretek.org>

01/22/2007 07:56 AM

To: James Chang/R9/USEPA/US@EPA, david.green@afropa.pentagon.af.mil  
cc: Jehiel Cass <jcass@rb6v.swrcb.ca.gov>  
Subject: RE: D-8 FOST RTCs

I guess I'm a little confused - this is the Hospital parcel, where no  
Dieldrin in soil is suspected.

---

Susan Soloyanis, Ph.D., P.G.  
Principal Scientist Mitretek Systems  
4610 Fox Road Cascade CO 80809  
719.684.0924 (voice)  
425.928.2573 (fax)  
www.mitretek.org

-----Original Message-----

From: Chang.James@epamail.epa.gov [mailto:Chang.James@epamail.epa.gov]  
Sent: Monday, January 22, 2007 8:49 AM  
To: david.green@afropa.pentagon.af.mil; Soloyanis, Susan  
Cc: Jehiel Cass  
Subject: D-8 FOST RTCs

Hi Dave and Susan,  
Here's EPA's review comments keyed to AF's subject RTCs:

1. Comment #2. EPA's regulatory concurrence is required for a 120(h)(4) CERFA Category 1 Parcel (ECC 1). The FOST must be revised to reflect this statutory requirement. The property may be transferred as ECC 3, not ECC 1. EPA cannot concur that the property is ECC 1 because Dieldrin, Lead Based Paint and Asbestos are present on the parcel.

2. Comment #3. EPA needs to see the draft deed language prior to its recording. Accordingly, please add "(and prior to recordation)" after "upon the completion" into the AF's response. EPA believes that the known, but uncharacterized pesticide contamination poses a potential risk to human health and the environment, and that the AF is thus obligated to take affirmative steps to address that risk. EPA believes that residential use restrictions on the parcel are warranted.

3. Comment #7. The AF's response only addresses the first concern expressed in EPA's comment. The remainder of EPA's comment remains relevant, as follows: "EPA has consistently maintained that Section 107 (i) does not limit the authority or obligation of the Air Force to respond to pesticide-related contamination. It is our position that where contamination resulting from pesticide application poses a risk to human health or the environment, such contamination must be addressed by the Air Force. Accordingly, the AF should conduct adequate soil sampling to evaluate the risks from pesticides." If the AF does not plan to conduct such sampling, and the LRA is willing to accept the parcel without the recommended sampling, EPA's Comment #7 should be highlighted as an unresolved comment.

EPA cannot hold the LRA liable for the dieldrin contamination left in place if it meets the requirements of Section 101(40) of CERCLA (defining "bona fide prospective purchasers"). However, if the LRA or its successors do anything that makes the situation worse, they can be held liable. AF should provide a disclosure statement in the deed for the dieldrin contamination left in place as there are potential inhalation risks for industrial workers if they disturb the contaminated areas.

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: James Chang/R9/USEPA/US  
To: John Hamill/R9/USEPA/US@EPA,  
Cc: Taly Jolish/R9/USEPA/US@EPA  
Date: 07/05/2007 01:58 PM  
Subject: Fw: The Info You Requested...Sort Of

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John,  
This is related to the voice mail from RWQCB with their ECC concern for the George Housing FOST...

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

----- Forwarded by James Chang/R9/USEPA/US on 07/05/2007 01:42 PM -----

"Jehiel Cass" <jcass@waterboards.ca.gov>

To <Michael.Kelly@afropa.pentagon.af.mil>

07/05/2007 12:59 PM

cc

<david.green@afpa.pentagon.af.mil>, James  
Chang/R9/USEPA/US@EPA, <Susan@sologeo.com>, "Cindi Mitton"  
<cmitton@waterboards.ca.gov>, "David Coupe"  
<DCoupe@waterboards.ca.gov>

Subject

Re: The Info You Requested...Sort Of

Mike - Thank you, the information you sent leads me to believe that the Environmental Condition Codes (ECC) were developed to specifically comply with CERCLA 120(h) & 40 CFR 373 for "hazardous substances", and not address relative risks that may (or may not) be associated with other substances such as dieldrin.

The Air Force policy has included (for this reporting purpose) petroleum substances along with "hazardous substances."

I would defer to the US EPA on the correct ECC classification for these parcels based on their understanding of "hazardous substances."

However, as we discussed, the response actions for dieldrin have not yet been completed.

Also, I note that per the Air Force policy, section 2.1.1.3, the quality of the water supply sources on the subject property should be evaluated. Because the existing groundwater has a MUNICIPAL Beneficial Use, the FOST should include a comparison of subsurface water quality with respect to primary and secondary drinking water standards. I believe (and Susan can correct me on this) that some of the newly installed wells in the base housing area were initially analyzed one-time for a full suite of drinking water standards.

I will make a comment on the draft FOST that this information should be summarized and a reference to the data included. Currently, the FOST only indicates that the potable water system was transferred to the Victor Valley Water District. I would think that you would want the land use restriction to clarify that if the transferee wants to use the groundwater source, then the effects of that use would be evaluated on receptors (e.g. Adelanto wells and/or delivered water) and with respect to whatever remedy is determined for dieldrin. The results of that evaluation should be incorporated into the planned water use. An industrial use of subsurface water may be acceptable or a demonstration of how the delivered water would meet DHS criteria for a MUN supply. I do not know all DHS requirements, but because only a Notification Level is exceeded, it may be OK to deliver that water for a MUN supply. The DHS may require water delivered for a MUN use to be monitored or treated. This could allow a controlled use in a manner that is protective of human health and the environment. This way the deed restriction is not so limiting as to exclude all groundwater pumping.

thanks - Jay

\*\*\*\*\*

Jehiel (Jay) Cass  
Water Resources Control Engineer  
CA Regional Water Quality Control Board  
Lahontan Region (6B)  
14440 Civic Dr., Ste 200  
Victorville CA 92392  
phone: (760) 241-2434  
fax: (760) 241-7308  
email: jcass@waterboards.ca.gov

web: <http://www.waterboards.ca.gov/lahontan/>

\*\*\*\*\*

Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations."

ED\_003054\_00008332-00027

\*\*\*\*\*

>>> "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>  
7/5/2007 11:50 AM >>>  
Jay,

Per our phone conversation this morning, there is good news and bad news. The good news, I am forwarding everything we have a day early. The bad news, I was mistaken we do not have the correct ASTMs. We have decided to pay for them today.

Old AF Reg for background purposes:

<<AFI 32-7066 - EBS.pdf>>  
Extracts/Summaries from the ASTM website of the appropriate ASTMs:

<<ASTM D5746-98 (2002) - ECCs.pdf>>

<<ASTM D6008-96 (2005) - Conducting EBSs.pdf>>

Links to the actual ASTM website (because the created PDFs above are not identical):

[http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/REDLINE\\_PAGES/D5746.htm?L+mystore+eoyc0807+1183672411](http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/REDLINE_PAGES/D5746.htm?L+mystore+eoyc0807+1183672411)

[http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/REDLINE\\_PAGES/D6008.htm?L+mystore+eoyc0807+1183673295](http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/REDLINE_PAGES/D6008.htm?L+mystore+eoyc0807+1183673295)

Mike

//SIGNED//  
Michael P. Kelly, Counsel

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3411 Olson St  
McClellan, CA 95652-1003  
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voice: (916) 643-6420, x 106  
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From: Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>  
To: Taly Jolish/R9/USEPA/US@EPA,

Cc: Green David E Civ AFRPA COO/McClellan <david.green@afropa.pentagon.af.mil>, James Chang/R9/USEPA/US@EPA  
Date: 03/02/2007 01:27 PM  
Subject: RE: FOST for Hospital at Former George AFB

---

Taly,

Here is a little more background for your consideration. As you are probably aware, DOD ECC 1 property as defined in the Air Force Instruction 32-7066 (that is way old) but still useful is property/facilities where "[n]o storage, release or disposal has occurred. Property where no hazardous substances or petroleum products or their derivatives were stored, released into the environment or structures, or disposed on the subject property and where no migration from adjacent areas has occurred." Based on the inspection and analysis that is in the FOST, ECC 1 fits parcel D-8. But the Air Force is willing to apply the typical 120(h)(3)(A) covenants, as requested by EPA just to get this property transferred. I do not believe that my HQ will ever give me the flexibility to say that the mere presence of ACM, LBP on walls or even old flakes in the soil around the building, or properly applied pesticides, for that matter, are "releases" or "disposals." And I don't think that it is even debatable that mere presence on the property/in the facility due to being used for intended purposes constitute "storage." Hence the impasse.

Thanks for your consideration. Have a great weekend.

Mike

SAF/GCN-RPO  
3411 Olson St  
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voice: (916)643-6420, x 106  
fax: (916)643-0460

Attorney Client Privilege/Attorney Work Product/FOUO

-----Original Message-----

From: Jolish.Taly@epa.gov [mailto:[Jolish.Taly@epa.gov](mailto:Jolish.Taly@epa.gov)]  
Sent: Thursday, March 01, 2007 4:44 PM  
To: Kelly Michael P Civ SAF/GCN-RPO McClellan  
Cc: Green David E Civ AFRPA COO/McClellan; Chang.James@epamail.epa.gov  
Subject: Re: FOST for Hospital at Former George AFB

Mike, unfortunately, this issue is not so minor as predicted, and I don't have a final answer for you. So far, it seems to me that EPA just disagrees with the Air Force's interpretation of ECC 1 here. From our perspective, the ECC 1 category was developed precisely to apply to uncontaminated parcels that are to be transferred under 120(h)(4). The description of Category 1 in the Fast Track to FOST guidance tracks the 120(h)(4) language, and EPA has always insisted that only uncontaminated parcels be categorized as ECC 1. Pledging to transfer an ECC 1 parcel that EPA considers contaminated under 120(h)(3) does not address this concern. In fact, we can't determine what advantage the Air Force might derive from its plan to label the parcel ECC 1 but then transfer it pursuant to 120(h)(3).

I will be speaking further with Bob Carr and James Chang early next week, and will plan to call you after that. Thanks. Taly

ED\_003054\_00008332-00043

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

Kelly Michael P  
Civ SAF/GCN-RPO  
McClellan  
<Michael.Kelly@af  
frpa.pentagon.af  
.mil>

02/28/2007 09:11  
AM

Taly Jolish/R9/USEPA/US@EPA

To

cc

Green David E Civ AFRPA  
COO/McClellan

<david.green@afarpa.pentagon.af.mil>

Subject

FOST for Hospital at Former  
George AFB

Taly,

As requested, so that you may see the latest response to James Chang's comments on the remaining FOST issue.

"Additional comments received from USEPA by email on 22 January 2007

Comment 2. EPA's regulatory concurrence is required for a 120(h)(4) CERFA Category 1 Parcel (ECC 1). The FOST must be revised to reflect this statutory requirement. The property may be transferred as ECC 3, not ECC 1. EPA cannot concur that the property is ECC 1 because Dieldrin, Lead Based Paint and Asbestos are present on the parcel.

AFRPA Response: The Air Force has determined that the parcel is properly characterized as ECC 1, but have and will include CERCLA Section 120(h)(3) covenants in the FOST and deed respectively. EPA concurrence is not required as long as the parcel is not transferred as "uncontaminated property" pursuant to CERCLA Section 120(h)(4). Air Force policy excludes the mere presence of properly applied Dieldrin, lead-based paint, and asbestos containing material on a parcel from being the factors that would require categorization as ECC 3. There is no evidence that any of these materials were stored, disposed of, or spilled on the parcel."

The Community Environmental Response Facilitation Act's (CERFA) [P.L. 102-426] requirements are actually separate from the Environmental Condition Category (ECC) framework, which is a creature of DOD. I freely admit that normally an ECC 1 parcel will be transferred pursuant to CERCLA Section 120(h)(4) as "uncontaminated property." However, this is NOT the case with respect to this hospital parcel.

I hope that this relatively minor issue will not hold up this transfer any longer. Thanks for you consideration.

Mike  
//SIGNED//  
Michael P. Kelly, Counsel

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Attorney Client Privilege/Attorney Work Product/FOUO

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>  
To: Taly Jolish/R9/USEPA/US@EPA,  
Cc: Green David E Civ AFRPA COO/McClellan <david.green@afropa.pentagon.af.mil>  
Date: 02/28/2007 09:12 AM  
Subject: FOST for Hospital at Former George AFB

---

Taly,

As requested, so that you may see the latest response to James Chang's comments on the remaining FOST issue.

**"Additional comments received from USEPA by email on 22 January 2007**

**Comment 2. EPA's regulatory concurrence is required for a 120(h)(4) CERFA Category 1 Parcel (ECC 1). The FOST must be revised to reflect this statutory requirement. The property may be transferred as ECC 3, not ECC 1. EPA cannot concur that the property is ECC 1 because Dieldrin, Lead Based Paint and Asbestos are present on the parcel.**

**AFRPA Response: The Air Force has determined that the parcel is properly**

**characterized as ECC 1, but have and will include CERCLA Section 120(h)(3) covenants in the FOST and deed respectively. EPA concurrence is not required as long as the parcel is not transferred as "uncontaminated property" pursuant to CERCLA Section 120(h)(4). Air Force policy excludes the mere presence of properly applied Dieldrin, lead-based paint, and asbestos containing material on a parcel from being the factors that would require categorization as ECC 3. There is no evidence that any of these materials were stored, disposed of, or spilled on the parcel."**

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Mike  
//SIGNED//  
Michael P. Kelly, Counsel

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To: Taly Jolish/R9/USEPA/US@EPA,  
Cc: Green David E Civ AFRPA COO/McClellan <[david.green@afropa.pentagon.af.mil](mailto:david.green@afropa.pentagon.af.mil)>, James Chang/R9/USEPA/US@EPA  
Date: 03/06/2007 03:18 PM  
Subject: RE: FOST for Hospital at Former George AFB

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Taly,

Thank you very much for your consideration.

I hope to have a draft MOA for the protection of groundwater (GW) monitoring wells, and even more broadly, GW remediation at the former George AFB by Monday. I am typing as fast as I can. And trying to think faster than I can type.

Mike Kelly

SAF/GCN-RPO  
3411 Olson St

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McClellan, CA 95652-1003  
email: Michael.Kelly@afropa.pentagon.af.mil  
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fax: (916)643-0460

-----Original Message-----

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Sent: Tuesday, March 06, 2007 11:48 AM  
To: Kelly Michael P Civ SAF/GCN-RPO McClellan  
Cc: Green David E Civ AFRPA COO/McClellan; Chang.James@epa.gov  
Subject: RE: FOST for Hospital at Former George AFB

Mike, it looks like EPA will be able to concur in the ECC-1 characterization, based on our current level of knowledge about the site and the proposed non-residential use. We'll send you a letter this week. Thanks. Taly

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>	Taly Jolish/R9/USEPA/US@EPA	To
03/02/2007 01:24 PM	Green David E Civ AFRPA COO/McClellan <david.green@afropa.pentagon.af.mil>, James Chang/R9/USEPA/US@EPA	cc
	Subject	
	RE: FOST for Hospital at Former George AFB	

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Kelly Michael P  
Civ SAF/GCN-RPO  
McClellan  
<Michael.Kelly@afropa.pentagon.af.mil>

02/28/2007 09:11  
AM

To	Taly Jolish/R9/USEPA/US@EPA
cc	Green David E Civ AFRPA COO/McClellan <david.green@afropa.pentagon.af.mil>
Subject	FOST for Hospital at Former



George AFB

Taly,

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"Additional comments received from USEPA by email on 22 January 2007

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Mike  
//SIGNED//  
Michael P. Kelly, Counsel

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To: <david.green@afropa.pentagon.af.mil>,  
Cc: <Michael.Kelly@afropa.pentagon.af.mil>, cox\_calvin@bah.com, jcase@waterboards.ca.gov, Taly Jolish/R9/USEPA/US@EPA  
Date: 08/30/2007 08:46 PM  
Subject: EPA's George Housing FOST Comments

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Dave,

Here are EPA's comments keyed to respective sections of the Housing FOST and Deed. I'll send you a signed copy upon returning to the office as I'm out starting tomorrow and entire next week. If you have questions, please cc Taly Jolish as she can address them also. Thanks

#### 4.0 Environmental Condition of the Property

EPA and the Air Force have a fundamental disagreement about the environmental condition of the property addressed in this FOST. The ECC 1 designation is reserved for "areas where no release or disposal of hazardous substances or petroleum products has occurred, including no migration of these substances from adjacent areas." The presence of Dieldrin, lead-based paint, and asbestos containing materials disqualifies the Property from classification as ECC 1.

With respect to the Dieldrin, EPA and the AF agree that the pesticide was applied many years ago and that some, unquantified levels of Dieldrin persist in the soil and groundwater; in fact, we agree that, as a result of the Dieldrin contamination, the groundwater cannot serve as a source of drinking water. Unlike the AF, however, EPA considers Dieldrin a hazardous substance and its application a release (albeit a release that would not have triggered the notice requirements of CERCLA Section 103), and therefore cannot concur in the ECC 1 designation.

This disagreement – which extends to every statement in the FOST indicating the absence of a CERCLA release on the Property, including statements in sections 5.1, 5.2, and 5.15 – must be documented in a section titled "Unresolved Comments."

#### 5.15 Pesticides

The AF again asserts here that "CERCLA Section 103 (e) excepts the Dieldrin present in soil and groundwater on and beneath the property from being a CERCLA release...." EPA continues to object to this misstatement of Section 103(e), as it has several times this year. Section 103 establishes notification and record keeping requirements, and the statement in Section 103(e) exempting pesticide

applications is explicitly limited to “this section.” The fact that a FIFRA-compliant application of a pesticide does not have to be reported to EPA does not imply or justify any other exemptions from CERCLA.

On a separate issue, this section of the FOST notes that the “SLUC will be signed and recorded immediately prior to deed transfer.” The SLUC, however, is drafted as an agreement between the new owner and the Regional Board; if it is recorded prior to transfer, the new owner will not yet have authority to agree to the SLUC provisions. We suggest a revision to reflect that the SLUC will be signed and recorded immediately following deed transfer.

#### Attachment 6, AFRPA Response to EPA Comment 2

EPA finds this response difficult to parse and potentially misleading to members of the public. The AF purports to agree that pesticides and their application fall within the CERCLA definitions of “hazardous substance” and “release,” respectively. The statements that follow these admissions, however, appear to contradict them without explanation. The AF should revise its response to clarify that CERCLA Section 103(e) exempts certain pesticide applications from notice requirements and that Section 107(i) precludes cost recovery and contribution actions for costs incurred as a result of certain pesticide applications. If the AF persists in its stated interpretations of these sections, it should clearly identify its position as an interpretation and NOT state that it is “consistent” with our website or any other EPA statement as to the meaning of CERCLA Section 103(e).

#### RWQCB Comment #2 on draft final FOST

FOST Table, Page 3. EPA concurs with RWQCB’s comment that the west side of LF-39 has not been addressed. Air Force should clarify the issue by discussing any specific investigations that may have taken place on the west side, and supports the Air Force’s “NFA” position in that area.

#### Quitclaim Deed, Section V Reservations, Paragraph B

This paragraph begins

AND FURTHER RESERVING UNTO THE Grantor, including *the United States Environmental Protection Agency (“EPA”)* and the California Regional Water Quality Control Board - Lohontan Region (RWQCB).... (emphasis added)

Please revise this paragraph to exclude EPA from inclusion as a “Grantor,” perhaps by substituting “as well as” for “including.” EPA cannot be “included” as Grantor because EPA does not have and is not permitted to have any property interest in the Property.

\*\*\*\*\*

James Chang

Phone: 415.972.3193 Fax: 415.947.3526

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: Taly Jolish/R9/USEPA/US

To: Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>,

Cc: Green David E Civ AFRPA COO/McClellan <david.green@afropa.pentagon.af.mil>, James Chang/R9/USEPA/US@EPA

Date: 03/01/2007 04:44 PM

Subject: Re: FOST for Hospital at Former George AFB

Mike, unfortunately, this issue is not so minor as predicted, and I don't have a final answer for you. So far, it seems to me that EPA just disagrees with the Air Force's interpretation of ECC 1 here. From our perspective, the ECC 1 category was developed precisely to apply to uncontaminated parcels that are to be transferred under 120(h)(4). The description of Category 1 in the Fast Track to FOST guidance tracks the 120(h)(4) language, and EPA has always insisted that only uncontaminated parcels be categorized as ECC 1. Pledging to transfer an ECC 1 parcel that EPA considers contaminated under 120(h)(3) does not address this concern. In fact, we can't determine what advantage the Air Force might derive from its plan to label the parcel ECC 1 but then transfer it pursuant to 120(h)(3).

I will be speaking further with Bob Carr and James Chang early next week, and will plan to call you after that. Thanks. Taly

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

✉ Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>

Kelly Michael P Civ SAF/GCN-RPO McClellan  
<Michael.Kelly@afropa.pentagon.af.mil>

02/28/2007 09:11 AM

To Taly Jolish/R9/USEPA/US@EPA

cc Green David E Civ AFRPA COO/McClellan  
<david.green@afropa.pentagon.af.mil>

Subject FOST for Hospital at Former George AFB

Taly,

As requested, so that you may see the latest response to James Chang's comments on the remaining FOST issue.

### **"Additional comments received from USEPA by email on 22 January 2007**

**Comment 2. EPA's regulatory concurrence is required for a 120(h)(4) CERFA Category 1 Parcel (ECC 1). The FOST must be revised to reflect this statutory requirement. The property may be transferred as ECC 3, not ECC 1. EPA cannot concur that the property is ECC 1 because Dieldrin, Lead Based Paint and Asbestos are present on the parcel.**

**AFRPA Response: The Air Force has determined that the parcel is properly characterized as ECC 1, but have and will include CERCLA Section 120(h)(3) covenants in the FOST and deed respectively. EPA concurrence is not required as long as the parcel is not transferred as "uncontaminated property" pursuant to CERCLA Section 120(h)(4). Air Force policy excludes the mere presence of properly applied Dieldrin, lead-based paint, and asbestos containing material on a parcel from being the factors that would require categorization as ECC 3. There is no evidence that any of these materials were stored, disposed of, or spilled on the parcel."**

The Community Environmental Response Facilitation Act's (CERFA) [P.L. 102-426] requirements are actually separate from the Environmental Condition Category (ECC) framework, which is a creature of DOD. I freely admit that normally an ECC 1 parcel will be transferred pursuant to CERCLA Section 120(h)(4) as "uncontaminated property." However, this is NOT the case with respect to this hospital parcel.

I hope that this relatively minor issue will not hold up this transfer any longer. Thanks for you consideration.

Mike  
//SIGNED//  
Michael P. Kelly, Counsel

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: [Michael.Kelly@afropa.pentagon.af.mil](mailto:Michael.Kelly@afropa.pentagon.af.mil)  
voice: (916)643-6420, x 106  
fax: (916)643-0460

## Attorney Client Privilege/Attorney Work Product/FOUO

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: James Chang/R9/USEPA/US  
To: [david.green@afropa.pentagon.af.mil](mailto:david.green@afropa.pentagon.af.mil),  
Cc: [cox\\_calvin@bah.com](mailto:cox_calvin@bah.com), [Gilbert.Dimidjian@us.mwhglobal.com](mailto:Gilbert.Dimidjian@us.mwhglobal.com), [Susan@sologeo.com](mailto:Susan@sologeo.com), [Jehiel Cass <jcass@rb6v.swrcb.ca.gov>](mailto:Jehiel.Cass@rb6v.swrcb.ca.gov), John Hamill/R9/USEPA/US@EPA, Taly Jolish/R9/USEPA/US@EPA  
Date: 07/26/2007 03:47 PM  
Subject: Housing FOST comments

---

Dave,  
Following are EPA's subject comments:.

1. Section 4, pg 3. The FOST identifies the property as an ECC 1, but ECC 7 is more appropriate because the dieldrin contaminated soil require additional evaluation. EPA believes that the contaminated soil poses a potential risk to human health and the environment, and that the AF should conduct an adequate evaluation to address that risk.
2. Section 5.15, pg 12. The text states that "the Dieldrin present in soil and groundwater is not considered a CERCLA release under Section 103...." Section 103 does not define the term "release." The proper application of a pesticide IS a release, per the definition in Section 101(22), and needs to be evaluated as such. Section 103 sets forth those circumstances which require notice to the agency, and does nothing more than exclude certain pesticide applications from the notice requirement.
3. EPA concurs with the proposed restrictions in Section 5.15. The text should also state that the AF will provide EPA with a draft deed for review before it is recorded, and that the transferred property will be covered by a SLUC to make the restrictions enforceable by the State.

Please call me if you have questions, thanks.

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: Taly Jolish/R9/USEPA/US

To: Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>  
Cc: Green David E Civ AFRPA COO/McClellan <david.green@afropa.pentagon.af.mil>, James Chang/R9/USEPA/US@EPA  
Date: 03/06/2007 11:48 AM  
Subject: RE: FOST for Hospital at Former George AFB

---

Mike, it looks like EPA will be able to concur in the ECC-1 characterization, based on our current level of knowledge about the site and the proposed non-residential use. We'll send you a letter this week. Thanks. Taly

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

▼ Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@afropa.pentagon.af.mil>

Kelly Michael P Civ SAF/GCN-RPO McClellan  
<Michael.Kelly@afropa.pentagon.af.mil>

To Taly Jolish/R9/USEPA/US@EPA

03/02/2007 01:24 PM

cc Green David E Civ AFRPA COO/McClellan  
<david.green@afropa.pentagon.af.mil>, James  
Chang/R9/USEPA/US@EPA

Subject RE: FOST for Hospital at Former George AFB

Taly,

Here is a little more background for your consideration. As you are probably aware, DOD ECC 1 property as defined in the Air Force Instruction 32-7066 (that is way old) but still useful is property/facilities where "[n]o storage, release or disposal has occurred. Property where no hazardous substances or petroleum products or their derivatives were stored, released into the environment or structures, or disposed on the subject property and where no migration from adjacent areas has occurred." Based on the inspection and analysis that is in the FOST, ECC 1 fits parcel D-8. But the Air Force is willing to apply the typical 120(h)(3)(A) covenants, as requested by EPA just to get this property transferred. I do not believe that my HQ will ever give me the flexibility to say that the mere presence of ACM, LBP on walls or even old flakes in the soil around the building, or properly applied pesticides, for that matter, are "releases" or "disposals." And I don't think that it is even debatable that mere presence on the property/in the facility due to being used for intended purposes constitute "storage." Hence the impasse.

Thanks for your consideration. Have a great weekend.

Mike

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: Michael.Kelly@afropa.pentagon.af.mil  
voice: (916) 643-6420, x 106  
fax: (916) 643-0460

Attorney Client Privilege/Attorney Work Product/FOUO

-----Original Message-----

From: Jolish.Taly@epa.gov [mailto:Jolish.Taly@epa.gov]  
Sent: Thursday, March 01, 2007 4:44 PM  
To: Kelly Michael P Civ SAF/GCN-RPO McClellan  
Cc: Green David E Civ AFRPA COO/McClellan; Chang.James@epamail.epa.gov  
Subject: Re: FOST for Hospital at Former George AFB

Mike, unfortunately, this issue is not so minor as predicted, and I don't have a final answer for you. So far, it seems to me that EPA just disagrees with the Air Force's interpretation of ECC 1 here. From our perspective, the ECC 1 category was developed precisely to apply to uncontaminated parcels that are to be transferred under 120(h)(4). The description of Category 1 in the Fast Track to FOST guidance tracks the 120(h)(4) language, and EPA has always insisted that only uncontaminated parcels be categorized as ECC 1. Pledging to transfer an ECC 1 parcel that EPA considers contaminated under 120(h)(3) does not address this concern. In fact, we can't determine what advantage the Air Force might derive from its plan to label the parcel ECC 1 but then transfer it pursuant to 120(h)(3).

I will be speaking further with Bob Carr and James Chang early next week, and will plan to call you after that. Thanks. Taly

Taly Jolish, Assistant Regional Counsel  
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75 Hawthorne Street (ORC-3)  
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Kelly Michael P Civ SAF/GCN-RPO McClellan <Michael.Kelly@af frpa.pentagon.af .mil>	Taly Jolish/R9/USEPA/US@EPA	To
	Green David E Civ AFRPA COO/McClellan <david.green@af frpa.pentagon.af.mil>	cc
02/28/2007 09:11 AM		
	FOST for Hospital at Former George AFB	Subject

Taly,

As requested, so that you may see the latest response to James Chang's comments on the remaining FOST issue.

"Additional comments received from USEPA by email on 22 January 2007

ED\_003054\_00008332-00055

Comment 2. EPA's regulatory concurrence is required for a 120(h)(4) CERFA Category 1 Parcel (ECC 1). The FOST must be revised to reflect this statutory requirement. The property may be transferred as ECC 3, not ECC 1. EPA cannot concur that the property is ECC 1 because Dieldrin, Lead Based Paint and Asbestos are present on the parcel.

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I hope that this relatively minor issue will not hold up this transfer any longer. Thanks for your consideration.

Mike  
//SIGNED//  
Michael P. Kelly, Counsel

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McClellan, CA 95652-1003  
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Attorney Client Privilege/Attorney Work Product/FOUO

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: "Rupe Sam Civ SAF/GCN-RPO" <sam.rupe@afarpa.pentagon.af.mil>  
To: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afarpa.pentagon.af.mil>, Robert Carr/R9/USEPA/US@EPA,  
Cc: Taly Jolish/R9/USEPA/US@EPA

ED\_003054\_00008332-00056



I'm available today and tomorrow, but prefer Mike's recommendation that we see the draft FOST language. I'll be out of the office next week to San Antonio, but can likely telecon from there, as need be.

Sam

//signed//  
SAM C. RUPE  
Associate General Counsel  
SAF/GCN-RPO  
1700 N. Moore Street, Suite 2300  
Arlington, VA 22209  
Voice: (703)696-5533  
Fax: (703)696-0981  
email: sam.rupe@afropa.pentagon.af.mil

-----Original Message-----

From: Kelly Michael P Civ SAF/GCN-RPO McClellan  
Sent: Thursday, September 06, 2007 12:35 PM  
To: 'Carr.Robert@epamail.epa.gov'; Rupe Sam Civ SAF/GCN-RPO  
Cc: Jolish.Taly@epamail.epa.gov  
Subject: RE: George

Bob, Sam and Taly,

Subsequent to my initial e-mail that triggered this activity and a discussion that I had with Sam Rupe yesterday, I am in the process of re-writing portions of the FOST. I will change the ECC to "3." I am also working on an "Other Covenant" for the draft Deed. Maybe you should see the revisions first and then decide whether we need to have a conference call(?). Hope to be done by COB. I am available to talk today and tomorrow.

Mike

//SIGNED//  
Michael P. Kelly, Counsel  
  
SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
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voice: (916)643-6420, x 106  
fax: (916)643-0460

Attorney Client Privilege/Attorney Work Product/FOUO

-----Original Message-----

From: Carr.Robert@epamail.epa.gov [mailto:Carr.Robert@epamail.epa.gov]  
Sent: Thursday, September 06, 2007 9:24 AM  
To: Rupe Sam Civ SAF/GCN-RPO

Cc: Jolish.Taly@epamail.epa.gov; Kelly Michael P Civ SAF/GCN-RPO  
McClellan  
Subject: George

I have discussed the George issues with the site attorney Taly Jolish and we agree that a conference call might be more effective than continued email exchanges. We are hoping to find a way to make this work, but are concerned that the larger issue of pesticide residue could get in the way.  
I have copied Taly and Mike Kelly on this email to get all interested attorneys involved. What is a good time for a call?

Robert Carr  
415 972 3913  
FAX 415 947 3570/71

"Rupe Sam Civ  
SAF/GCN-RPO"  
<sam.rupe@afropa.  
pentagon.af.mil>

Robert Carr/R9/USEPA/US@EPA

To

cc

09/05/2007 02:35  
PM

Subject

RE: Update on Lowry Litigation

Bob

I can't specifically recollect the FOST language change to address the asbestos issue that you and Jay had discussed. If you have that, please send.

To the extent there may be a desire by EPA or the State to revise our asbestos language in the FOST to reflect the tentative outcome of the Richmond Homes (Lowry builders) litigation, I don't think we're interested in altering any of our deed or FOST language in a manner that reflects such an outcome, unless it (wording change) was meant to strengthen our future litigative position.

Mike called me about the George situation. Can you explain to me EPA's position and rationale? I'll assume what you provide me is purely informal and not to be held against you or EPA in any further discussions on the issue. I take a hard line position against holding up the property transfer solely because of the presence of dieldrin in soil/groundwater from past usage of pesticides (not a result of pesticide spill), if there is not an unacceptable risk from a risk management perspective. Whether the property is ECC 1 or ECC 3, I don't care, because our (AF) focus should be on whether we can give the 120(h)(3) covenant, rather than worrying about which environmental condition code that DOD developed many moons ago which may apply to the property.

I always have hope that an acceptable compromise can be reached that addresses EPA's concerns as well as the Air Force's, so any rationale you can provide reflecting what you perceive is EPA's concern on the proposed George property transfer would be greatly appreciated. It could really help in seeing if there is some mutually acceptable way forward on that issue.

Sam

//signed//  
SAM C. RUPE  
Associate General Counsel  
SAF/GCN-RPO  
1700 N. Moore Street, Suite 2300  
Arlington, VA 22209  
Voice: (703)696-5533  
Fax: (703)696-0981  
email: sam.rupe@afropa.pentagon.af.mil

-----Original Message-----

From: Carr.Robert@epamail.epa.gov [mailto:Carr.Robert@epamail.epa.gov]  
Sent: Wednesday, September 05, 2007 5:22 PM  
To: Rupe Sam Civ SAF/GCN-RPO  
Subject: Re: Update on Lowry Litigation

I understand that you don't want to discuss the progress of the case itself, I was more interested in how the Af was responding. As you recall Jay and I worked on some FOST language to address the issue of asbestos which might be encountered on transfer parcels. As I recall, the last deed language was somewhat different so I wondered if you were thinking about changing the FOST language as well. Perhaps this is part of the "model deed" discussion.

Robert Carr  
415 972 3913  
FAX 415 947 3570/71

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From: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>  
To: Robert Carr/R9/USEPA/US@EPA, "Rupe Sam Civ SAF/GCN-RPO" <sam.rupe@afropa.pentagon.af.mil>,  
Cc: Taly Jolish/R9/USEPA/US@EPA  
Date: 09/06/2007 09:34 AM  
Subject: RE: George

---

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Mike

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SAF/GCN-RPO

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email: Michael.Kelly@afropa.pentagon.af.mil

voice: (916)643-6420, x 106

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Sent: Thursday, September 06, 2007 9:24 AM

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Cc: Jolish.Taly@epamail.epa.gov; Kelly Michael P Civ SAF/GCN-RPO

McClellan

Subject: George

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"Rupe Sam Civ

SAF/GCN-RPO"

<sam.rupe@afropa.

pentagon.af.mil>

Robert Carr/R9/USEPA/US@EPA

To

cc

09/05/2007 02:35

PM

Subject

RE: Update on Lowry Litigation

Bob

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send.

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Sam

//signed//  
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Arlington, VA 22209  
Voice: (703) 696-5533  
Fax: (703) 696-0981  
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-----Original Message-----

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Robert Carr  
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From: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>  
To: James Chang/R9/USEPA/US@EPA,  
Cc: Taly Jolish/R9/USEPA/US@EPA, "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, "Jehiel Cass" <jcass@waterboards.ca.gov>  
Date: 09/04/2007 01:49 PM  
Subject: RE: EPA's George Housing FOST Comments

---

Hi James,

I need to make sure that I understand the import of EPA's comments and your intentions before we can adequately respond. I appreciate your indulgence, but I have to be careful because this is a sensitive area with our headquarters. The following is solely based upon my interpretation and analysis of EPA's comments:

1. If the AF can figure out some way to explain an "ECC 3" and drop the "ECC 1" without agreeing that the pesticide application was a CERCLA "release," then EPA will concur with the Housing FOST
2. With respect to all of our differences over the application of a pesticide, to include the statements and discussion in sections 5.1, 5.2, and 5.15, the AF can simply highlight/document these differences as "Unresolved Comments/Issues" and still receive EPA concurrence with the FOST
3. LF-39 section just needs clarification, but will not preclude EPA concurrence

Thanks. Need to find out as soon as possible.

Mike

//SIGNED//

Michael P. Kelly, Counsel

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: Michael.Kelly@afropa.pentagon.af.mil  
voice: (916) 643-6420, x 106  
fax: (916) 643-0460

-----Original Message-----

From: Chang.James@epamail.epa.gov [mailto:Chang.James@epamail.epa.gov]  
Sent: Thursday, August 30, 2007 8:47 PM  
To: Green David E Civ AFRPA COO/McClellan  
Cc: Kelly Michael P Civ SAF/GCN-RPO McClellan; cox\_calvin@bah.com;  
jcass@waterboards.ca.gov; Jolish.Taly@epamail.epa.gov  
Subject: EPA's George Housing FOST Comments

Dave,

Here are EPA's comments keyed to respective sections of the Housing FOST and Deed. I'll send you a signed copy upon returning to the office as

ED\_003054\_00008332-00062

I'm out starting tomorrow and entire next week. If you have questions, please cc Taly Jolish as she can address them also. Thanks

#### 4.0 Environmental Condition of the Property

EPA and the Air Force have a fundamental disagreement about the environmental condition of the property addressed in this FOST. The ECC 1 designation is reserved for "areas where no release or disposal of hazardous substances or petroleum products has occurred, including no migration of these substances from adjacent areas." The presence of Dieldrin, lead-based paint, and asbestos containing materials disqualifies the Property from classification as ECC 1.

With respect to the Dieldrin, EPA and the AF agree that the pesticide was applied many years ago and that some, unquantified levels of Dieldrin persist in the soil and groundwater; in fact, we agree that, as a result of the Dieldrin contamination, the groundwater cannot serve as a source of drinking water. Unlike the AF, however, EPA considers Dieldrin a hazardous substance and its application a release (albeit a release that would not have triggered the notice requirements of CERCLA Section 103), and therefore cannot concur in the ECC 1 designation.

This disagreement - which extends to every statement in the FOST indicating the absence of a CERCLA release on the Property, including statements in sections 5.1, 5.2, and 5.15 - must be documented in a section titled "Unresolved Comments."

#### 5.15 Pesticides

The AF again asserts here that "CERCLA Section 103 (e) excepts the Dieldrin present in soil and groundwater on and beneath the property from being a CERCLA release...." EPA continues to object to this misstatement of Section 103(e), as it has several times this year. Section 103 is establishes notification and record keeping requirements, and the statement in Section 103(e) exempting pesticide

applications is explicitly limited to "this section." The fact that a FIFRA-compliant application of a pesticide does not have to be reported to EPA does not imply or justify any other exemptions from CERCLA.

On a separate issue, this section of the FOST notes that the "SLUC will be signed and recorded immediately prior to deed transfer." The SLUC, however, is drafted as an agreement between the new owner and the Regional Board; if it is recorded prior to transfer, the new owner will not yet have authority to agree to the SLUC provisions. We suggest a revision to reflect that the SLUC will be signed and recorded immediately following deed transfer.

#### Attachment 6, AFRPA Response to EPA Comment 2

EPA finds this response difficult to parse and potentially misleading to members of the public. The AF purports to agree that pesticides and their application fall within the CERCLA definitions of "hazardous substance" and "release," respectively. The statements that follow these admissions, however, appear to contradict them without explanation. The AF should revise its response to clarify that CERCLA Section 103(e) exempts certain pesticide applications from notice requirements and that Section 107(i) precludes cost recovery and contribution actions for costs incurred as a result of certain pesticide applications. If the AF persists in its stated interpretations of these sections, it should clearly identify its position as an interpretation and NOT state that it is "consistent" with our website or any other EPA statement as to the meaning of CERCLA Section 103(e).

#### RWQCB Comment #2 on draft final FOST

FOST Table, Page 3. EPA concurs with RWQCB's comment that the west side of LF-39 has not been addressed. Air Force should clarify the issue by discussing any specific investigations that may have taken



place on the west side, and supports the Air Force's "NFA" position in that area.

Quitclaim Deed, Section V Reservations, Paragraph B

This paragraph begins

AND FURTHER RESERVING UNTO THE Grantor, including the United States Environmental Protection Agency ("EPA") and the California Regional Water Quality Control Board - Lohontan Region (RWQCB).... (emphasis added)

Please revise this paragraph to exclude EPA from inclusion as a "Grantor," perhaps by substituting "as well as" for "including." EPA cannot be "included" as Grantor because EPA does not have and is not permitted to have any property interest in the Property.

\*\*\*\*\*

James Chang

Phone: 415.972.3193 Fax: 415.947.3526

**Ex. 5 AC/DP**

# Ex. 5 AC/DP

-----Forwarded by Taly Jolish/R9/USEPA/US on 09/04/2007 02:32PM -----

To: James Chang/R9/USEPA/US@EPA  
From: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>  
Date: 09/04/2007 01:49PM  
cc: Taly Jolish/R9/USEPA/US@EPA, "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, "Jehiel Cass" <jcass@waterboards.ca.gov>  
Subject: RE: EPA's George Housing FOST Comments

Hi James,

I need to make sure that I understand the import of EPA's comments and your intentions before we can adequately respond. I appreciate your indulgence, but I have to be careful because this is a sensitive area with our headquarters. The following is solely based upon my interpretation and analysis of EPA's comments:

1. If the AF can figure out some way to explain an "ECC 3" and drop the "ECC 1" without agreeing that the pesticide application was a CERCLA "release," then EPA will concur with the Housing FOST
2. With respect to all of our differences over the application of a pesticide, to include the statements and discussion in sections 5.1, 5.2, and 5.15, the AF can simply highlight/document these differences as "Unresolved Comments/Issues" and still receive EPA concurrence with the FOST
3. LF-39 section just needs clarification, but will not preclude EPA concurrence

Thanks. Need to find out as soon as possible.

Mike

//SIGNED//  
Michael P. Kelly, Counsel

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: Michael.Kelly@afropa.pentagon.af.mil  
voice: (916) 643-6420, x 106  
fax: (916) 643-0460

-----Original Message-----

From: Chang.James@epamail.epa.gov [mailto:Chang.James@epamail.epa.gov]  
Sent: Thursday, August 30, 2007 8:47 PM  
To: Green David E Civ AFRPA COO/McClellan  
Cc: Kelly Michael P Civ SAF/GCN-RPO McClellan; cox\_calvin@bah.com; jcass@waterboards.ca.gov; Jolish.Taly@epamail.epa.gov  
Subject: EPA's George Housing FOST Comments

Dave,

Here are EPA's comments keyed to respective sections of the Housing FOST

and Deed. I'll send you a signed copy upon returning to the office as I'm out starting tomorrow and entire next week. If you have questions, please cc Taly Jolish as she can address them also. Thanks

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\*\*\*\*\*

James Chang

Phone: 415.972.3193 Fax: 415.947.3526

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: Robert Carr/R9/USEPA/US  
To: "Rupe Sam Civ SAF/GCN-RPO" <sam.rupe@afropa.pentagon.af.mil>,  
Cc: Taly Jolish/R9/USEPA/US@EPA, Michael.Kelly@afropa.pentagon.af.mil  
Date: 09/06/2007 09:24 AM  
Subject: George

---

I have discussed the George issues with the site attorney Taly Jolish and we agree that a conference call might be more effective than continued email exchanges. We are hoping to find a way to make this work, but are concerned that the larger issue of pesticide residue could get in the way. I have copied Taly and Mike Kelly on this email to get all interested attorneys involved. What is a good time for a call?

Robert Carr  
415 972 3913  
FAX 415 947 3570/71  
✉ "Rupe Sam Civ SAF/GCN-RPO" <sam.rupe@afropa.pentagon.af.mil>

"Rupe Sam Civ SAF/GCN-RPO"  
<sam.rupe@afropa.pentagon.af.mil>

09/05/2007 02:35 PM

To Robert Carr/R9/USEPA/US@EPA

cc

Subject RE: Update on Lowry Litigation

Bob

ED\_003054\_00008332-00069

I can't specifically recollect the FOST language change to address the asbestos issue that you and Jay had discussed. If you have that, please send.

To the extent there may be a desire by EPA or the State to revise our asbestos language in the FOST to reflect the tentative outcome of the Richmond Homes (Lowry builders) litigation, I don't think we're interested in altering any of our deed or FOST language in a manner that reflects such an outcome, unless it (wording change) was meant to strengthen our future litigative position.

Mike called me about the George situation. Can you explain to me EPA's position and rationale? I'll assume what you provide me is purely informal and not to be held against you or EPA in any further discussions on the issue. I take a hard line position against holding up the property transfer solely because of the presence of dieldrin in soil/groundwater from past usage of pesticides (not a result of pesticide spill), if there is not an unacceptable risk from a risk management perspective. Whether the property is ECC 1 or ECC 3, I don't care, because our (AF) focus should be on whether we can give the 120(h)(3) covenant, rather than worrying about which environmental condition code that DOD developed many moons ago which may apply to the property.

I always have hope that an acceptable compromise can be reached that addresses EPA's concerns as well as the Air Force's, so any rationale you can provide reflecting what you perceive is EPA's concern on the proposed George property transfer would be greatly appreciated. It could really help in seeing if there is some mutually acceptable way forward on that issue.

Sam

//signed//  
SAM C. RUPE  
Associate General Counsel  
SAF/GCN-RPO  
1700 N. Moore Street, Suite 2300  
Arlington, VA 22209  
Voice: (703)696-5533  
Fax: (703)696-0981  
email: sam.rupe@afropa.pentagon.af.mil

-----Original Message-----

From: Carr.Robert@epamail.epa.gov [mailto:Carr.Robert@epamail.epa.gov]  
Sent: Wednesday, September 05, 2007 5:22 PM  
To: Rupe Sam Civ SAF/GCN-RPO  
Subject: Re: Update on Lowry Litigation

I understand that you don't want to discuss the progress of the case itself, I was more interested in how the Af was responding. As you recall Jay and I worked on some FOST language to address the issue of asbestos which might be encountered on transfer parcels. As I recall, the last deed language was somewhat different so I wondered if you were thinking about changing the FOST language as well. Perhaps this is part of the "model deed" discussion.

Robert Carr  
415 972 3913  
FAX 415 947 3570/71

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>  
To: Taly Jolish/R9/USEPA/US@EPA,  
Cc: "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, "David Coupe" <DCoupe@waterboards.ca.gov>, Robert Carr/R9/USEPA/US@EPA, <Soloyanis@comcast.net>, James Chang/R9/USEPA/US@EPA  
Date: 09/12/2007 04:19 PM  
Subject: RE: Housing parcel FOST and SEBS

---

Taly,

Thanks for such a quick response! I am incorporating your position and most of your other comments.

Mike

//SIGNED//

Michael P. Kelly, Counsel

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: Michael.Kelly@afropa.pentagon.af.mil  
voice: (916) 643-6420, x 106  
fax: (916) 643-0460

-----Original Message-----

From: Jolish.Taly@epamail.epa.gov [mailto:Jolish.Taly@epamail.epa.gov]  
Sent: Wednesday, September 12, 2007 3:47 PM  
To: Kelly Michael P Civ SAF/GCN-RPO McClellan  
Cc: Green David E Civ AFRPA COO/McClellan; David Coupe;  
Carr.Robert@epamail.epa.gov; Soloyanis@comcast.net;  
Chang.James@epamail.epa.gov  
Subject: RE: Housing parcel FOST and SEBS

Mike, Bob and I have discussed the draft you sent and have the following suggested revisions. Also, I would request that you delete the sentence "CERCLA's general statutory scheme supports the Air Force position," or at least preface it with "It is the Air Force position that..."

EPA and State Position

It is the EPA and RWQCB's position that there is no "pesticide exemption" under CERCLA and that the presence of Dieldrin in the soils and groundwater under this Property constitutes a CERCLA release. The regulators note that CERCLA Section 9603 does not limit the definition of "release", but excludes certain activities, including the proper application of a pesticide, from reporting requirements. Further, the regulators assert that CERCLA Section 9607(i) only exempts the application of pesticide from activities which give rise to EPA's right to recover response costs. EPA has consistently maintained that Section 9607(i) does not limit the authority or obligation of the Air Force to respond

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to pesticide-related contamination.

EPA believes the Air Force has not adequately evaluated the Dieldrin contamination to determine whether, or under what circumstances, they could pose a threat to human health and the environment. In light of the available information regarding the nature and extent of soil contamination and the anticipated reuse of the property, which includes a major commercial construction project, evaluation of the risk would be of limited value.

Though our respective positions could not be reconciled and the comments relating to pesticides remain unresolved, the Air Force has altered this FOST in a manner which addresses some of the regulators' concerns. The Air Force has designated the Property ECC-3 rather than ECC-1. EPA and RWQCB believe that the release of Dieldrin and the presence of lead-based paint and asbestos containing materials preclude an ECC-1 designation for the Property. All parties agree that the Property is suitable for transfer, and the Air Force intends to provide a Section 120(h)(3) covenants in the Deed.

I will be back in the office on Friday morning. Thank you. Taly

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

"Kelly Michael P  
Civ SAF/GCN-RPO  
McClellan"  
<Michael.Kelly@af  
frpa.pentagon.af  
.mil>

09/12/2007 10:51  
AM

To  
Taly Jolish/R9/USEPA/US@EPA,  
"David Coupe"  
<DCoupe@waterboards.ca.gov>  
cc  
<Soloyanis@comcast.net>, "Green  
David E Civ AFRPA COO/McClellan"  
<david.green@afarpa.pentagon.af.mil>, Robert Carr/R9/USEPA/US@EPA  
Subject  
RE: Housing parcel FOST and SEBS

Taly and Dave,

Here is a revised section of the FOST covering Pesticides. Need to discuss this afternoon. I continue to make changes to the draft deed provision on pesticides and am open to changes.

Mike



//SIGNED//

Michael P. Kelly, Counsel

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: Michael.Kelly@afropa.pentagon.af.mil  
voice: (916) 643-6420, x 106  
fax: (916) 643-0460

# Ex. 5 AC/DP

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: Taly Jolish/R9/USEPA/US  
To: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>,  
Cc: "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, "David Coupe" <DCoupe@waterboards.ca.gov>, Robert

ED\_003054\_00008332-00073

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I will be back in the office on Friday morning. Thank you. Taly

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

✉ "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>

"Kelly Michael P Civ SAF/GCN-RPO McClellan"  
<Michael.Kelly@afropa.pentagon.af.mil>

09/12/2007 10:51 AM

To	Taly Jolish/R9/USEPA/US@EPA, "David Coupe" <DCoupe@waterboards.ca.gov>
cc	<Soloyanis@comcast.net>, "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, Robert Carr/R9/USEPA/US@EPA
Subject	RE: Housing parcel FOST and SEBS

Taly and Dave,

Here is a revised section of the FOST covering Pesticides. Need to discuss this afternoon. I continue to make changes to the draft deed provision on pesticides and am open to changes.

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//SIGNED//

Michael P. Kelly, Counsel

SAF/GCN-RPO  
3411 Olson St  
McClellan, CA 95652-1003  
email: [Michael.Kelly@afropa.pentagon.af.mil](mailto:Michael.Kelly@afropa.pentagon.af.mil)  
voice: (916)643-6420, x 106  
fax: (916)643-0460

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: James Chang/R9/USEPA/US  
To: "Bahr Debra J Civ AFRPA COO/McClellan" <[debra.bahr@afropa.pentagon.af.mil](mailto:debra.bahr@afropa.pentagon.af.mil)>,  
Cc: [cox\\_calvin@bah.com](mailto:cox_calvin@bah.com), "Green David E Civ AFRPA COO/McClellan" <[david.green@afropa.pentagon.af.mil](mailto:david.green@afropa.pentagon.af.mil)>, [jcass@waterboards.ca.gov](mailto:jcass@waterboards.ca.gov), "Kelly Michael P Civ SAF/GCN-RPO McClellan" <[Michael.Kelly@afropa.pentagon.af.mil](mailto:Michael.Kelly@afropa.pentagon.af.mil)>, Robert Carr/R9/USEPA/US@EPA, Taly Jolish/R9/USEPA/US@EPA, John Hamill/R9/USEPA/US@EPA  
Date: 09/18/2007 03:59 PM  
Subject: Re: George Housing FOST

---

Debra,  
Since the AF doesn't provide an unresolved comments section as EPA suggested, then the LBP and ACM should also be mentioned with the dieldrin as unresolved comments in Section 6/Regulator Coordination. I'll start the concurrence letter when this section is revised. Thanks

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

▼ "Bahr Debra J Civ AFRPA COO/McClellan" <[debra.bahr@afropa.pentagon.af.mil](mailto:debra.bahr@afropa.pentagon.af.mil)>

"Bahr Debra J Civ AFRPA COO/McClellan"  
<[debra.bahr@afropa.pentagon.af.mil](mailto:debra.bahr@afropa.pentagon.af.mil)>

09/18/2007 03:13 PM

To James Chang/R9/USEPA/US@EPA

cc "Green David E Civ AFRPA COO/McClellan"  
<[david.green@afropa.pentagon.af.mil](mailto:david.green@afropa.pentagon.af.mil)>, "Kelly Michael P Civ SAF/GCN-RPO McClellan" <[Michael.Kelly@afropa.pentagon.af.mil](mailto:Michael.Kelly@afropa.pentagon.af.mil)>,  
<[cox\\_calvin@bah.com](mailto:cox_calvin@bah.com)>, Taly Jolish/R9/USEPA/US@EPA, Robert Carr/R9/USEPA/US@EPA, <[jcass@waterboards.ca.gov](mailto:jcass@waterboards.ca.gov)>

Subject George Housing FOST

James,

Dave is out of the office today and asked that I forward the corrected FOST to you. If the changes are acceptable, please proceed with the concurrence letter. Let me know if you have any questions.

Thank you!

//SIGNED//

Debra J. Bahr

Air Force Real Property Agency

Western REC, Real Estate Assistant

3411 Olson Street

McClellan CA 95652-1003

916-643-6420 x222

Fax: 916-643-0460[attachment "George Housing FOST rev09-18-07.doc" deleted by James Chang/R9/USEPA/US]

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>

To: "Bahr Debra J Civ AFRPA COO/McClellan" <debra.bahr@afropa.pentagon.af.mil>, James Chang/R9/USEPA/US@EPA, Taly Jolish/R9/USEPA/US@EPA,

Cc: <cox\_calvin@bah.com>, "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>

Date: 09/18/2007 09:01 PM

Subject: RE: George Housing FOST

---

Debra,

Since James has not even started the concurrence letter, and now that I have had a chance to look at these suggested changes (from Taly Jolish, not Bob Carr), I think that in Section 5.15 we should not include the requested phrase "Dieldrin contamination." The AF disagrees with this characterization. Just delete the word "contamination" at the end of the sentence or say "the Dieldrin present."

Whether or not there is a separate section entitled "Unresolved Comments" is purely a formatting issue. This is our document, I am not sure why this should matter to EPA. [James or Taly can you please explain?] See if James can direct you to a recent FOST that had such a separate section, as Taly mentions in one of her e-mails. Otherwise, it seems like we could just create a section, call it "Unresolved Comments" and say "See Section 15.5, paragraphs \_\_\_\_." Section 15.5 already mentions the fact that EPA disagrees with the presence of ACM and LBP on the Property as not being "releases." I think that this was what Taly wanted to highlight.

Mike

---

From: Chang.James@epamail.epa.gov [mailto:Chang.James@epamail.epa.gov]

Sent: Tue 9/18/2007 3:59 PM

To: Bahr Debra J Civ AFRPA COO/McClellan

Cc: cox\_calvin@bah.com; Green David E Civ AFRPA COO/McClellan; jcass@waterboards.ca.gov;

Kelly Michael P Civ SAF/GCN-RPO McClellan; Carr.Robert@epamail.epa.gov;

Jolish.Taly@epamail.epa.gov; Hamill.John@epamail.epa.gov

Subject: Re: George Housing FOST

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\*\*\*\*\*

James Chang

Phone: 415.972.3193 Fax: 415.947.3526

"Bahr Debra J  
Civ AFRPA  
COO/McClellan"  
<debra.bahr@afrp  
a.pentagon.af.mi  
l>

09/18/2007 03:13  
PM

James Chang/R9/USEPA/US@EPA To  
cc

"Green David E Civ AFRPA  
COO/McClellan"  
<david.green@afropa.pentagon.af.mi  
l>, "Kelly Michael P Civ  
SAF/GCN-RPO McClellan"  
<Michael.Kelly@afropa.pentagon.af.  
mil>, <cox\_calvin@bah.com>, Taly  
Jolish/R9/USEPA/US@EPA, Robert  
Carr/R9/USEPA/US@EPA,  
<jcass@waterboards.ca.gov>

Subject

George Housing FOST

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FOST to you. If the changes are acceptable, please proceed with the  
concurrence letter. Let me know if you have any questions.

Thank you!

//SIGNED//

Debra J. Bahr

Air Force Real Property Agency

Western REC, Real Estate Assistant

3411 Olson Street

McClellan CA 95652-1003

916-643-6420 x222

Fax: 916-643-0460[attachment "George Housing FOST rev09-18-07.doc"

deleted by James Chang/R9/USEPA/US]

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: James Chang/R9/USEPA/US  
To: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>,  
Cc: cox\_calvin@bah.com, "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, "Bahr Debra J Civ AFRPA COO/McClellan" <debra.bahr@afropa.pentagon.af.mil>, Taly Jolish/R9/USEPA/US@EPA  
Date: 09/19/2007 07:55 AM  
Subject: RE: George Housing FOST

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Mike,  
George has used the statement "remediation of LBP hazards remain unresolved" in past FOSTs under "Section 7/Unresolved Regulatory Comments." It helps to highlight the standard unresolved issues else they get buried in the document. Examples of past unresolved comments entries are in following FOSTs:  
1) Parcels C-18 thru C-22, D-11, D-17 thru D-22, Southwest Portion C-14 & D-5  
2) Parcel B, Excluding B-11

The unresolved comments reference to LBP, ACM and dieldrin can be placed under Section 6/Regulatory Coordination or to a new Section 7/Unresolved Regulatory Comments. Dave is anxious to make his mandated FY07 transfer date for this FOST, so can you get us the revised FOST soon as my concurrence letter needs several internal approvals before it goes out, and I'm out next week Thanks

\*\*\*\*\*  
James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

▼ "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>

"Kelly Michael P Civ SAF/GCN-RPO McClellan"  
<Michael.Kelly@afropa.pentagon.af.mil>

09/18/2007 09:01 PM

To "Bahr Debra J Civ AFRPA COO/McClellan"  
<debra.bahr@afropa.pentagon.af.mil>, James  
Chang/R9/USEPA/US@EPA, Taly Jolish/R9/USEPA/US@EPA

cc <cox\_calvin@bah.com>, "Green David E Civ AFRPA COO/McClellan"  
<david.green@afropa.pentagon.af.mil>

Subject RE: George Housing FOST

Debra,

Since James has not even started the concurrence letter, and now that I have had a chance to look at these suggested changes (from Taly Jolish, not Bob Carr), I think that in Section 5.15 we should not include the requested phrase "Dieldrin contamination." The AF disagrees with this characterization. Just delete the word "contamination" at the end of the sentence or say "the Dieldrin present."

Whether or not there is a separate section entitled "Unresolved Comments" is purely a formatting issue. This is our document, I am not sure why this should matter to EPA. [James or Taly can you please explain?] See if James can direct you to a recent FOST that had such a separate section, as Taly mentions in one of her e-mails. Otherwise, it seems like we could just create a section, call it "Unresolved Comments" and say "See Section 15.5, paragraphs \_\_\_\_." Section 15.5 already mentions the fact that EPA disagrees with the presence of ACM and LBP on the Property as not being "releases." I think that this was what Taly wanted to highlight.

Mike

ED\_003054\_00008332-00078

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From: Chang.James@epamail.epa.gov [mailto:Chang.James@epamail.epa.gov]  
Sent: Tue 9/18/2007 3:59 PM  
To: Bahr Debra J Civ AFRPA COO/McClellan  
Cc: cox\_calvin@bah.com; Green David E Civ AFRPA COO/McClellan; jcass@waterboards.ca.gov;  
Kelly Michael P Civ SAF/GCN-RPO McClellan; Carr.Robert@epamail.epa.gov;  
Jolish.Taly@epamail.epa.gov; Hamill.John@epamail.epa.gov  
Subject: Re: George Housing FOST

Debra,  
Since the AF doesn't provide an unresolved comments section as EPA suggested, then the LBP and ACM should also be mentioned with the dieldrin as unresolved comments in Section 6/Regulator Coordination. I'll start the concurrence letter when this section is revised. Thanks

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

"Bahr Debra J Civ AFRPA COO/McClellan" <debra.bahr@afropa.pentagon.af.mil>  09/18/2007 03:13 PM	James Chang/R9/USEPA/US@EPA  "Green David E Civ AFRPA COO/McClellan" <david.green@afropa.pentagon.af.mil>, "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>, <cox_calvin@bah.com>, Taly Jolish/R9/USEPA/US@EPA, Robert Carr/R9/USEPA/US@EPA, <jcass@waterboards.ca.gov>  Subject George Housing FOST
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James,

Dave is out of the office today and asked that I forward the corrected FOST to you. If the changes are acceptable, please proceed with the concurrence letter. Let me know if you have any questions.

Thank you!

//SIGNED//

Debra J. Bahr

Air Force Real Property Agency

Western REC, Real Estate Assistant

3411 Olson Street

McClellan CA 95652-1003

916-643-6420 x222

Fax: 916-643-0460[attachment "George Housing FOST rev09-18-07.doc"

deleted by James Chang/R9/USEPA/US]

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: Taly Jolish/R9/USEPA/US

To: James Chang/R9/USEPA/US@EPA,

Cc: Robert Carr/R9/USEPA/US@EPA

Date: 09/17/2007 05:22 PM

Subject: George FOST/Deed suggestions

---

James, I have reviewed the new versions of the Deed and the FOST. I have no major concerns, but would like to suggest the following revisions:

#### FOST

Section 4, first sentence -- Substitute "AFRPA considers the Property" for "the Property is considered."

Section 5.1, last phrase of first sentence -- Substitute "and AF records do not indicate that any hazardous substances were" in place of "or were known to have been."

Section 5.2, third paragraph -- "CERCLA Covenants" refers to the Section 120(h)(3) covenants discussed in Section 8, not to environmental restriction covenants. Substitute "Pursuant to CERCLA regulations, the Deed will include covenants..." in place of "CERCLA Covenants will be included in the Deed...."

Section 5.7 -- Point of clarification: is there a state action level for Dieldrin?

Section 5.15, first paragraph -- The sentence about our disagreement would be clearer if the AFRPA would add after "...disagree with AFRPA" the phrase "about the appropriate characterization of, and response to, the Dieldrin contamination." As is, the sentence suggests that the regulators disagree about where and how the AF applied the Dieldrin.

Section 5.15, last sentence of "AFRPA Position" -- The phrase "management of Dieldrin in-place" suggests some affirmative activity, such as in-situ treatment. Please add "possible exposure to" so that the sentence would read as follows: "...AFRPA believes that the management of possible exposure to Dieldrin is protective."

Unresolved Comments Section -- Consistent with other recent FOST documents, the FOST should include a separate section for unresolved comments, which could refer to substantive discussions above.

#### Deed

Section I -- In light of the AFRPA's interchangeable use of "Grantor" and "United States," the parenthetical should be expanded to read "(the 'Grantor' or 'United States')."



Section V, B -- The second sentence suggests that EPA's right of access is a gift bestowed by the AF. I suggest "Consistent with the terms of the Federal Facility Agreement, EPA and the State (and their respective officials, etc.) shall retain their current right of access to the Property."

Section VII, B, 2(b) and C -- For consistency, I would prefer that EPA be referred to simply as "EPA" rather than "EPA" in some places and "EPA Region IX" in others.

Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925

----- Forwarded by Taly Jolish/R9/USEPA/US on 04/30/2013 09:26 AM -----

From: James Chang/R9/USEPA/US  
To: david.green@afropa.pentagon.af.mil,  
Cc: "Kelly Michael P Civ SAF/GCN-RPO McClellan" <Michael.Kelly@afropa.pentagon.af.mil>, Taly Jolish/R9/USEPA/US@EPA, Robert Carr/R9/USEPA/US@EPA, Jehiel Cass <jcass@rb6v.swrcb.ca.gov>, Susan@sologeo.com, cox\_calvin@bah.com  
Date: 09/18/2007 06:20 AM  
Subject: Fw: George FOST/Deed suggestions

---

Dave,  
Hope you can make the below suggested FOST/Deed changes. I'll start the concurrence letter process soon as EPA receives the revised electronic versions. Thanks for considering our comments.

\*\*\*\*\*

James Chang  
Phone: 415.972.3193 Fax: 415.947.3526

----- Forwarded by James Chang/R9/USEPA/US on 09/18/2007 05:57 AM -----

Taly Jolish/R9/USEPA/US

09/17/2007 05:22 PM

To	James Chang/R9/USEPA/US@EPA
cc	Robert Carr/R9/USEPA/US@EPA
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Taly Jolish, Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street (ORC-3)  
San Francisco, CA 94105  
(415) 972-3925